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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

PARKRIDGE INVESTORS LIMITED PARTNERSHIP, BY HAROLD MORTIMER, DAVID MORTIMER, AND JOHN PHELPS, GENERAL PARTNERS, Petitioner

v.

FARMERS HOME ADMINISTRATION, AN AGENCY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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54 pp

Question Presented for Review

Did the circuit court err in holding that the Emergency Low Income Housing Preservation Act, 42 U.S.C. § 1472(c), which places conditions on Petitioner's unrestricted contract right to pre-pay its loans with Respondent, does not violate Petitioner's right under the Fifth Amendment to the United States Constitution not to be deprived of its property without due process of law?

Table of Contents

	Page
Questions Presented for Review	i
Table of Contents	ii
Opinions Below	iii
Jurisdiction of Supreme Court	iii
Authority	iv
Statement of the Case	1
Reasons for Granting Writ	3
Certificate of Service	8

Appendix
Eighth Circuit Opinion
District Court Order Granting
Summary Judgment

Table of Authorities

CONSTITUTION

U.S. CONST., Amend. V.

CASES

Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986).

Lynch v. U.S., 292 U.S. 571 (1934).

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)

Perry v. U.S., 294 U.S. 330 (1935).

Union Pacific R.R. Co. v. U.S., 99 U.S. (9 Otto) 700 (1879).

STATUTES

42 U.S.C. § 1472(c)(3).

42 U.S.C. § 1472(c)(4)(A).

42 U.S.C. § 1472(c)(5)(A)(i).

42 U.S.C. § 1472(c)(5)(A)(ii).

Opinions Below

Parkridge Investors Ltd. v. Farmers Home Admin., 13 F.3d 1192 (8th Cir. 1994).

Parkridge Investors Ltd. v. Farmers Home Admin., Civ. 92-5052, Order Granting Defendant's Motion for Summary Judgment, signed and entered December 17, 1992.

Jurisdiction of Supreme Court

The statutory provision on which the jurisdiction of this Court is invoked is 28 U.S.C. § 1254(1).

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit filed January 7, 1994, and reported as Parkridge Investors Ltd. v. Farmers Home Admin., 13 F.3d 1192 (8th Cir. 1994).

Authority

U.S. CONST., Amend. V. No person shall be . . .deprived of . . .property, without due process of law[.]

42 U.S.C. § 1472(c)(3). Not less than 30 days after receiving an offer to prepay any loan made or insured under . . . this title, the Secretary shall provide written notice of the offer or request to the tenants of the housing and related facilities involved, to interested nonprofit organizations, and to any appropriate State and local agencies.

42 U.S.C. § 1472(c)(4)(A). Before accepting any offer to prepay . . . any loan made or insured under . . . this title pursuant to a contract entered into before prior to December 15, 1989, the Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year

period beginning on the date on which the agreement is executed.

42 U.S.C. § 1472(c)(5)(A)(i). If the Secretary determines after a reasonable period that an agreement will not be entered into with a borrower . . . the Secretary shall require the borrower . . . to offer to sell the assisted housing . . . to any qualified nonprofit organization or public agency at a fair market value[.]

42 U.S.C. § 1472(c)(5)(A)(ii). If, upon the expiration of 180 days after an offer is made to sell housing and related facilities . . . no qualified nonprofit organization or public agency has made a bona fide offer to purchase, the Secretary may accept the offer to prepay[.]

Statement of the Case

In 1985 Petitioner bought an apartment building in Deadwood, South Dakota, from Ridgestone Apartments, Partnership (Ridgestone). Ridgestone had purchased the building in 1974 with financing obtained from Respondent under Section 515 of the Housing Act of 1949, 42 U.S.C. § 1485, known as the Rural Rental Housing Program. That financing consisted of three loans made to Ridgestone by Respondent. Those

loans were incorporated into promissory notes which provided, in part, that "[p]repayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower." The notes and mortgage between Ridgestone and Respondent and the assumption agreement between Petitioner and Respondent all provided that they were subject to the present regulations of the Farmers Home Administration (FmHA), and to its future regulations not inconsistent with the express provisions of the document. When Petitioner bought the building it agreed, with Respondent's approval, to assume Ridgestone's rights and obligations under the promissory notes and loan documents between Ridgestone and Respondent.

In 1990, Petitioner tendered payment of the unpaid principal and interest under the loan agreements' prepayment clauses.

Respondent refused to accept prepayment, referring Petitioner to the provisions of 42 U.S.C. § 1472(c). Petitioner responded by insisting that Respondent honor Petitioner's right to prepay. Respondent refused.

Petitioner sued Respondent for a declaration that Respondent was obligated under the terms of the promissory notes to accept prepayment and satisfy the notes and mortgage. The district court granted summary judgment for Respondent. The United States Court of Appeals for the Eighth Circuit affirmed. The Eighth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291.

Reasons for Granting Writ

The Eighth Circuit decided an important question of federal law which has not been, but should be, settled by this Court. Petitioner and Respondent, an agent

of the United States Government, had an agreement. That agreement is unambiguous in granting Petitioner the right to prepay its loans. There were no restrictions on that right. The only basis on which a restriction could be claimed is the provision in each loan that the note was subject to present FmHA regulations and to its future regulations not inconsistent with the express provisions of the note. There is no question that under the then current regulations, the right of prepayment was absolute. And, the Eighth Circuit said that it "reject[ed] outright the notion, advanced by FmHA, that the procedures required under [42 U.S.C. § 1472(c)] are consistent with the loan agreements[.]" Parkridge, 13 F.3d at 1197. Nonetheless, the Eighth Circuit held that legislation passed after Petitioner assumed the loans abrogated Petitioner's right to

prepay and this abrogation did not violate Petitioner's right not to be deprived of its property without due process of law.

The Eighth Circuit relied on Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) and Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), neither of which apply to this case. The law which applies to this case is found in the line of cases represented by Union Pacific R. R. Co. v. U.S., 99 U.S. (9 Otto) 700 (1879), Lynch v. U.S., 292 U.S. 571 (1934), and Perry v. U.S., 294 U.S. 330 (1935). Those cases are old but solid. They stand for the proposition that when the United States contracts it must abide by its promises. It may not renege, simply because it is expensive to abide by its agreement. The United States does not want Petitioner, and others similarly situated, to prepay its housing loans

because the United States then would need to appropriate money to build more low-income housing. By forcing existing low-income housing to retain its low-income status, the United States saves itself money. Refusing to allow unrestricted prepayment is purely a matter of economic expediency. Such expediency is not a legitimate basis for allowing Respondent to breach its agreement with Petitioner. Such a breach forces Petitioner to bear an unwarranted share of the public burden of providing low-income housing.

The Eighth Circuit decision is ominous in its implications for future dealings between private parties and the United States. Private parties are now on notice that the United States can and will abrogate a contract term it no longer finds in its economic interest. If the Eighth Circuit decision is not reversed, the

private sector will be reluctant to contract with the United States. This situation is not in the best interest of the people. The United States needs to contract with the private sector in order to implement important legislative and policy objectives for our country.

Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

Dated this 4th day of April, 1994.

BANKS. JOHNSON & COLBATH

By Ronald W Banks
Ronald W. Banks, Counsel
of Record for
Petitioner.

P. O. Box 9007
Rapid City, SD 57709-9007
(605) 341-2400

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing "Petition for Writ of Certiorari" upon the person herein next designated, on the date below shown, by depositing a copy thereof in the United States mail at Rapid City, South Dakota, first class postage prepaid thereon, in an envelope addressed as follows, to-wit:

Robert A. Mandel
Assistant U. S. Attorney
P. O. Box 2893
Rapid City, SD 57709-2893

which address is the last address of the above-named person known to the subscriber.

Dated this 4th day of April, 1994.

BANKS, JOHNSON & COLBATH

By Ronald W. Banks
Ronald W. Banks,
Counsel of Record
for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-1270SD

Parkridge Investors Limited Partnership, by Harold Mortimer, David Mortimer, and John Phelps, General Partners,	*	On Appeal from the
Appellant,	*	United States
vs.	*	District Court for
Farmers Home Administration, an Agency of the United States Department of Agriculture,	*	the District of South Dakota.
Appellee.	*	

Submitted: October 12, 1993

Filed: January 7, 1994

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN and LOKEN, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

This case is about the power of the United States to modify its contractual obligations, by statute, to prevent the frustration

of clear program purposes. We sympathize with the view of appellant, Parkridge Investors, that the United States has acted unfairly in this instance; even so, we conclude that firmly entrenched legal doctrine allows the government to act as it did. Therefore, we decline to hold unconstitutional the Emergency Low Income Housing Preservation Act, 42 U.S.C. § 1472(c), as applied to appellant's loan, and thus affirm the District Court's[1] grant of summary judgment in favor of appellee Farmers Home Administration (FmHA).

I.

The Rural Rental Housing Program, Section 515 of the Housing Act of 1949, 42 U.S.C. § 1485, was

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[1]The Honorable Richard H. Battey, United States District Judge for the District of South Dakota.

enacted to ameliorate housing shortages for the elderly and other low-income persons in rural areas. See Lifgren v. Yeutter, 767 F. Supp. 1473, 1477 (D. Minn. 1991). among other provisions, the statute authorizes FmHA to make loans to developer and owners of rural rental units. In exchange, borrowers agree to provide affordable housing over the duration of their government-assisted mortgages. Ibid. The clear objective of the program--expanding the stock of rural rental housing for low-income persons--provides the backdrop for this case.

Ridgestone Apartments is a multi-family complex in Deadwood, South Dakota. The 13-unit complex was constructed by the Ridgestone partnership with financing obtained

in 1974 from FmHA under the Rural Rental Housing Program. As part of the transaction, FmHA made three loans to the Ridgestone partnership, which were incorporated into the provisions of a promissory note. The note provided, in part, that "[p]repayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower." (Emphasis supplied.) This transaction also involved tow mortgages, both of which stated that "[t]his instrument shall be subject to the present regulations of the [FmHA], and to its future regulations not inconsistent with the express provisions hereof." (Emphasis supplied).

In 1985, Parkridge bought the complex and assumed the rights and

obligations of the Ridgestone partnership. FmHA approved the sale, conditioned upon execution of a new loan agreement and assumption agreements. The assumption agreements provided that predecessor agreements would remain "in full force and effect," except where modified by the new agreements.[2] The assumption agreements also reiterated that they were "subject to present regulations of the [FmHA] and to its future regulations which are not inconsistent with the express provisions hereof." (Emphasis supplied). The parties agree that, as of that time, Parkridge had a practically unfettered option to prepay.

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[2]For simplicity's sake, the mortgages, promissory notes, assumption agreements, and other documents from both 1974 and 1985 will be referred to collectively as the "loan agreements."

In 1987, Congress passed the Emergency Low income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815, 1877, 1886-90 (1988), 42 U.S.C. § 1472(c) (the Preservation Act). This legislation responded to congressional concern that a large portion of the federally assisted housing stock, including 150,000 units constructed under the FmHA program, was vulnerable to prepayment and therefore removal from the low-income market--thus thwarting the basic purpose of the program. Id. at 1877-78; H. R. Rep. No. 122(I), 100th Cong., 1st Sess. 53, reprinted in 1987 U.S. Code Cong. & Admin. News 3317, 3369-70. The provisions of the Preservation Act are well summarized in a recent Minnesota district court case:

> Prior to the enactment of the Preservation Act, borrowers of Section 515 loans. . .had the option of prepaying their mortgages at any time and removing their project from the program without restrictions. . . .
>
> Under the Preservation Act, an owner of a project funded by a. . . Section 515 loan who wishes to prepay his outstanding indebtedness must submit a request to pre-pay to the FmHA. Before 30 days pass, the FmHA must notify each tenant of the housing unit as well as interested nonprofit organizations and appropriate state and local agencies that the owner of the project has submitted a request to prepay the Section 515 loan. 42 U.S.C. § 1472(c)(3). The FmHA is not allowed to accept prepayment offers until it complies with certain steps specified in the Preservation Act. First, the FmHA must attempt to enter into an agreement under which the lower of the project commits to extend the low income use of the project for 20 years from the date of such agreement. 42 U.S.C. § 1472(c)(4)(A). Because the Preservation

> Act aims at extending the low income use of Section 515 projects, the FmHA is authorized to offer various financial incentives to owners who have indicated a desire to pre-pay Section 515 loans. . . . 42 U.S.C. § 1472(c)(4)(B). If, despite the incentives the FmHA has offered to the owner, the owner will not enter into an agreement to extend the low income use of the project, then the FmHA must require the owner to offer to sell the project to a qualified nonprofit organization of public agency at fair market value. 42 U.S.C. § 1472(c)(5)(A).[3] Once the project is offered for sale to a qualified nonprofit organization or public agency, if 180 days passes without a bona fide offer of purchase being submitted, then the FmHA may accept the owner's prepayment request. 42 U.S.C. § 1472(c)(5)(A)(ii).

Lifgren, 767 F. Supp. at 1478

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[3]There are two exceptions to the sale requirement, but both come into play only after FmHA has sought to negotiate an agreement which will extend the life of the project, and both are rather restrictive. 42 U.S.C. § 1472(c)(5)(G); Lifgren, 767 F. Supp at 1478-79.

(footnote omitted).[4]

FmHA has issued Preservation Act regulations, codified at 7 C.F.R. § 1965.90. Under the relevant provisions,[5] when FmHA receives a prepayment request, it first determines the need for low-income housing, then offers financial incentives to induce the borrower to extend low-income use. 7 C.F.R. § 1965, Exh. E(III-IV). If the borrower refuses to enter

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[4]The Preservation Act contains additional limitations on the right to pre-pay. First, prepayment is prohibited in the absence of available funds for helping non-profits finance purchases. 42 U.S.C. § 1472(c)(5)(A)(ii). Second, no more than 5,000 units may be transferred each fiscal year, excluding those pre-paid under the § 1472(c)(5)(G) exceptions. 42 U.S.C. § 1472(c)(5)(F). However, both of these constraints are waived if 15 months have passed without any budget authority to finance transfers. Ibid.

[5]Because neither party has suggested that the loans in this case are subject to "restrictive-use clauses," which would mandate a specific period of operation as low-income housing, we apply Exhibit E of the regulations. See 7 C.F.R. § 1965.90(b)(1)-(2).

into such an agreement, FmHA determines if one of the two narrow exceptions outlined in 42 U.S.C. § 1472(c)(5)(G) applies. 7 C.F.R. § 1965, Exh. E(V). IF these exceptions do not apply, the project's fair-market value is determined.[6] and FmHA requires the borrower to offer the project for sale--to a qualified nonprofit organization or public agency--for a period of 180 days. 7 C.F.R. § 1965, Exh. E(IV). Finally, should the borrower receive no bona fide offer by the end of this time period, then FmHA will accept prepayment on the loan--so long as federal funds are either then available to assist a potential purchaser, or have not been available for any project in the

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[6]The process by which fair market value is determined is discussed in detail below.

nation for 15 months. 7 C.F.R. § 1965, Exh. E(VII).

In short, whereas under the old scheme FmHA had to accept prepayment from borrowers like Parkridge at any time, under the Preservation Act FmHA may accept prepayment only at the end of an intricate, six-month-long (or longer) procedure. Moreover, should a willing non-profit or public agency purchaser emerge, the party desiring to prepay may not even wind up in possession of the property.[7]

In August of 1990, Parkridge sought permission to prepay its loan under the terms of the loan

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[7]Indeed, the legislative history implies that the drafters envisioned that all pre-paid units would be sold to non-profits and government agencies, with help from the federal government. H. R. Rep. No. 122(I), 100th Cong., 1st Sess. 54-55, reprinted in 1987 U.S. Code Cong. & Admin. News 3317, 3370-71.

instruments. FmHA declined the offer and countered with incentives to continue providing housing to eligible persons under an extended loan agreement. Parkridge rejected the incentives and renewed its offer of full payment. Again, FmHA refused, asserting that "the loan documents as amended, including the right to prepay, were modified by the assumption agreements, was well as the mortgages which provided that these loans were subject to regulatory changes which modified the option to prepay. . . . Jt. App. 44. Instead, FmHA proposed that the apartments be appraised and offered for sale to a non-profit organization, in order to retain the property in the program for the balance of the project's useful life. Parkridge rejected this

proposal and sued, seeking a declaration that FmHA is unconditionally obligated to accept the offer of prepayment, because the Preservation Act is unconstitutional as applied to the partnership's loans.

The District Court concluded that the Preservation Act passed constitutional muster. Order of Dec. 17, 1992, at 5. In its decision, the Court relied largely on Lifgren v. Yeutter, supra, which held, with respect to contractual provisions virtually identical to those in this case, that the regulations promulgated pursuant to the Preservation Act were not inconsistent with the applicable loan agreements and did not constitute an unconstitutional taking under the Fifth Amendment. 767 F.Supp. at 1485-88. This

appeal followed.

II.

On appeal, Parkridge argues that FmHA's refusal to accept prepayment breaches the clear terms of the loan agreements and constitutes a denial of Parkridge's due-process rights and an unconstitutional taking under the Fifth Amendment.[8] In response, FmHA argues that 10 the new legislation is not truly inconsistent with the regulations existing at the time of the initial loan; 2) even if the Preservation Act's terms are inconsistent with the contract, the government's actions were foreseeable give the purposes of the program; 3) the

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[8]Parkridge does not raise, nor do we address, any claim that the Preservation Act is unconstitutional because it is the kind of law which, if enacted by a state, would violate the Contracts Clause of the Constitution. Art. I, § 10.

government, through its contract, did not unmistakably waive its sovereign power to amend statutory provisions which pertain to the contract; 4) the case is not yet ripe to determine whether there has been an unconstitutional taking, because Parkridge refused to abide by the prescribed procedures and offer the project for sale; and 5) there could be no unconstitutional taking here because, under the terms of the Preservation Act, Parkridge is guaranteed fair market value for the project.

Before proceeding to address Parkridge's central claims, we make three preliminary comments. First, it is undisputed that FmHA has acted in accordance with the Preservation Act and it regulations. Second, if only by virtue of the delay the partnership

faces in selling or otherwise making alternative use of its property, Parkridge has already suffered injury sufficient to provide standing to bring suit. Third, we reject outright the notion, advanced by FmHA, that the procedures required under the Preservation Act are consistent with the loan agreements between the agency and Parkridge; we believe that the Lifgren Court was incorrect in this regard. See 767 F. Supp. 1486. Before the Act, Parkridge could prepay at any time, with virtually no restrictions; now, if the partnership is allowed to prepay at all, it cannot do so until it complies with the Act, a process which may take up to six months to complete. The more likely result is that the partnership will have to sell the

project altogether, rather than prepaying and retaining ownership. Perhaps the new requirements could be considered procedural in nature, but, in any event, they are facially inconsistent with the loan agreements.

III.

Beginning with the due-process claim made by Parkridge, we observe that this is not a procedural-due-process case. Parkridge is not claiming that FmHA denied it a hearing or some other form of procedural safeguard. Rather, the partnership is complaining about the likely outcome: that it will be forced to sell the property to a third party, rather than exercising the option to pay off the loan, refinance, and use the property in a more profitable fashion. At a minimum, Parkridge argues, the

partnership faces a lengthy and expensive delay in realizing its desire to prepay. Thus, the claim in this case is one of substantive due process, based on the assertion of property rights in the loan agreements. See Thetford Properties IV Limited Partnership v. U.S. Dept. of Housing and Urban Development, 907 F.2d 445, 49 (4th Cir. 1990)("The gravamen of appellants' due process challenge is not the procedure for approving prepayment itself, but rather is Congress' ability to constitutionally condition prepayment at all.").

Assuming, without deciding, that the partnership has a protected property interest in its contractual right to prepay the loan obligations, we assess Parkridge's argument that, under

the Fifth Amendment, the United States must abide by the terms of its contract, just as if it were a private party. As pointed out by the Lifgren Court, on a general level, Parkridge is correct. See Lynch v. United States, 292 U.S. 571, 580 (1934); Perry v. United States, 294 U.S. 330, 351-54 (1935).[9] However, "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 52 (1986), quoting Merrion v. Jicarilla Apache Tribe, 455 U.S.

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[9]See also Cohen and Mattis, Prepayment rights: Abrogation By the Low-Income Housing Preservation and Resident Homeownership Act of 1990, 28 Real Property, Probate and Trust Journal of the ABA 1, 36 (1993) (analyzing Housing and Urban Development-related amendments to the Preservation Act).

130, 147 (1982). In Merrion, the Supreme Court observed that "sovereign power. . . is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." 455 U.S. at 148 (quoted with approval in Bowen, 477 U.S. at 52). Thus, "contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." Bowen, 477 U.S. at 52-53.

The key language of Parkridge's loan agreements makes its contract subject to "[FmHA's] future regulations which are not inconsistent with the express provisions hereof." Future regulations of FmHA, however, are not synonymous with future acts of

Congress. The Untied States cannot be said to have unmistakably waived one of its most vital powers, that of enacting legislation, by virtue of this contract language.[10] Moreover, the clear objectives of the Rural Rental Housing Program were necessarily known to the borrower, Parkridge.[11] Parkridge could have foreseen that Congress might amend the program's enabling legislation if necessary to carry out the purposes of the program. Cf. Bowen, 477 U.S. at 52. Although government involvement can serve to enhance the attractiveness of property, its involvement may

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[10]Such a waiver might require explicit statutory authority, but we need not decide that question here.

[11]For instance, the terms of Parkridge's "Amended Loan Agreement" included a "regulatory covenant" not to use the housing "for any purpose other than as rental housing and related facilities for eligible occupants," without prior consent of the government. Jt. App. 68, ¶ 6(e)(1).

also increase certain types of risk; Parkridge embraced that risk when it assumed Ridgestone's loan obligations in 1985. Therefore, given that Parkridge contracted with FmHA in the context of the clear goals of the Rural Rental Housing Program, and given that the United States did not clearly waive its sovereign powers to modify its obligations via statute, we hold that the United States did not violate the substantive-due-process rights of Parkridge by altering the terms of the loan agreement through the Preservation Act.[12]

IV.

Parkridge also argues that the government has effected an

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[12] Cf. Cohen and Mattis, supra note 9, suggesting that limitations on prepayment rights violate the Contracts Clause, as "incorporated" by the Fifth Amendment, but not substantive due process. 28 Real Property, Probate and Trust Journal of the ABA at 42, 44.

unconstitutional taking by refusing to accept Parkridge's offer to prepay and by requiring the partnership to go through the process established by the Preservation Act. Again assuming, without deciding, that Parkridge has a protected property interest in the right to prepay its loan obligations, we determine first, whether a compensable taking has occurred.

The Supreme Court has identified two types of regulatory action which categorically constitute takings, and thereby mandate compensation under the Fifth Amendment. The first type of taking occurs when a property owner suffers a physical invasion of property. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). The second type of

taking occurs when the government regulation "denies all economically beneficial or productive use" of the property. Ibid. Neither category applies here. In situations not encompassed by these categories, the Supreme Court has instructed courts to engage in a factual inquiry, taking into account "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984), quoting PruneYard Shopping Center v. Robins, 447 U.S. 74 83 (1980). A case might be made that the Preservation Act interferes with Parkridge's investment-backed expectations.[13] Yet, we have

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[13]Cohen and Mattis, supra note 9, at 31.

already found hat, when Parkridge assumed Ridgestone's obligations, it was foreseeable that the government might impair the partnership's contractual options in order to prevent the program's purposes from being foiled. Therefore, we cannot agree that Parkridge's expectation of a continued, unrestricted right to prepay was "reasonable." We conclude that application of the Preservation Act to Parkridge does not work a compensable taking.

Even if we did find a compensable taking, however, Parkridge's claim would still suffer from two conspicuous faults. First, takings are unconstitutional only if they are unaccompanied by just compensation. Thus, at most Parkridge would be entitled to the fair market value of its property;

yet, fair market value is exactly what the partnership would receive a result of a statutorily compelled sale to a non-profit. Parkridge responds that if it sold the project for "fair market value," as required under the Preservation Act, it would not receive the value of the property for its highest and best use, but rather its value in a "closed market." limited to use as low-income housing. Yet Parkridge has called nothing to the attention of the Court indicating that such a narrow valuation methodology would apply.[14] The statute simply provides that fair market value shall be determined:

> by 2 independent appraisers, one of whom shall be selected by [FmHA] and one of whom

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[14]Even if a closed market were used, there might be no constitutional problem, given that Congress financed the property to serve a specific public purpose.

> shall be selected by the borrower. If the 2 appraisers fail to agree on the fair market value, [FmHA] and the borrower shall jointly select a third appraiser, whose appraisal shall be binding on [FmHA] and the borrower.

42 U.S.C. § 1472(c)(5)(A)(i).[15] Moreover, it is conceivable that no qualified buyer will be willing to make a bid at the fair market price. If this happens, FmHA can allow Parkridge to prepay--precisely the outcome the partnership seeks in this lawsuit. Therefore, except perhaps for the loss caused by the delay in disposing of the apartments, Parkridge's damages are entirely speculative. Even if the Act represented a taking, it may turn

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[15]FmHA's regulations do state that appraisals will be conducted in accordance with FmHA Instruction 1922-B, "available in any FmHA Office." 7 C.F.R. § 1965, Exh. E(V)(A). Neither side has favored us with a copy of this directive.

out to be justly compensated, and therefore constitutional. Cf. Thetford Properties, 908 F.2d at 448 (holding that suit challenging provisions of Preservation Act conditioning right to prepay HUD-insured mortgages is barred by plaintiff's failure to exhaust administrative remedies.[16]

Finally, even if damages were certain, Parkridge has sought the wrong remedy. In effect, the partnership seeks specific performance of its prerogative to exercise the loan-agreement option

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[16]"[U]nder certain circumstances, HUD has the authority to grant [the borrowers] the ultimate economic relief that they seek--prepayment and withdrawal from the program. . . . Further, if they choose to remain in the program, the statute also allow HUD to offer appellants economic incentive to give them a 'fair return' on their investment. . . . Thus, requiring exhaustion here may very well lead to a satisfactory resolution of this controversy without having to reach appellant's constitutional challenge." Ibid. (citations omitted).

to prepay. However, "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." Monsanto, supra, 467 U.S. at 1016 (footnote omitted). Further, the Fifth Amendment does not require that compensation precede the taking. Ibid. "Generally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act, 28 U.S.C. § 1491." Ibid. Thus, even if parkridge suffered a taking resulting in a loss, it has failed to demonstrate why a post-taking damages action would not suffice.

V.

To summarize: the government

may have acted unfairly in sharply curtailing, if not eliminating altogether, Parkridge's right to prepay. Clearly the Preservation Act is inconsistent with the terms of the loan agreements. However, we reject both due-process and takings challenges to this legislation. Parkridge was aware of the clear objectives of the program, and thus the risk of statutory change. The government, for its part, did not unmistakably waive its right to make such changes. Furthermore, we conclude no taking has occurred; even if one had, Parkridge has fallen far short of demonstrating that it will receive constitutionally insufficient compensation for its property under the Preservation Act scheme.

For the foregoing reasons, we

decline to hold the Emergency Low Income Housing Preservation Act and supporting regulations unconstitutional as applied to the circumstances of this case. Therefore, the judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

PARKRIDGE INVESTORS LIMITED PARTNERSHIP, by HAROLD MORTIMER, DAVID MORTIMER, and JOHN PHELPS, General Partners,	)	CIV. 92-5052
Plaintiffs,	)	ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
vs.	)	
UNITED STATES FARM HOME ADMINISTRATION, an Agency of the United States Department of Agriculture,	)	
Defendant.	)	

A status conference was held on the above case wherein counsel represented to the Court that there are no disputed questions of fact. The parties agreed that the case be submitted on stipulated facts; and the Court ordered the parties to file briefs on the legal issues to be decided. Both parties have filed their written briefs and the case is now ripe for decision.

FACTUAL BACKGROUND

In early November 1985, plaintiffs, acting for the named limited partnership, purchased an apartment building in Deadwood, Lawrence County, South Dakota. The apartment building was financed under section 515 of the Housing Act of 1949, 42 U.S.C. § 1485, commonly referred to as the Rural Rental Housing Program.

Three loans were made to plaintiffs' predecessors in interest and title.[1] All three of these loans were incorporated into the provisions of a Promissory Note which provided in part, that "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower." At the time plaintiffs purchased the apartment

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[1]The first two loans were made in August, 1974 and the third loan in October, 1974.

building, plaintiffs agreed, conditioned upon the approval of defendant, to assume the rights and the obligations of and to plaintiffs' grantors and defendant, under the promissory note and the loan documents.

There are two real estate mortgages relevant to this case. Both of these mortgages contain the following language: "(21) This instrument shall be subject to the present regulations of the Farmers Home Administration, and to its future regulations not inconsistent with the express provisions hereof." See Exhibits A and B, attached to defendant's statement of material facts, docket #11. Plaintiffs have also signed three assumption agreements, each of which contain the above language. See Exhibits C, D, and E, attached to docket #11.

In August of 1990, plaintiffs offered

tender payment of the unpaid principal and interest by requesting permission to prepay the loan under the terms and conditions of the loan instruments. Defendant did not accept the offer of prepayment and instead offered incentives to remain in the program of providing subsidized housing under an extended loan agreement that would have restricted the right of prepayment. Plaintiffs rejected the offered incentive and renewed their tender offer of full payment in satisfaction of the mortgage. Defendant refused plaintiffs' tender and refused the request for prepayment asserting that the loan documents, including the right to prepay, were modified by the assumption agreements, as well as the mortgages which provided that the loans were subject to regulatory changes which modified the option to prepay

in this case.

Defendant proposed that the secured property be appraised and that the property be offered for sale to a nonprofit organization or public government agency that would agree to continue the property in the subsidized housing program for the balance of the useful life of the property involved. Plaintiffs refused this proposal and brought the instant lawsuit seeking a declaration that defendants are legally obligated to accept tender of the balance due on the note and to thereafter satisfy the note and mortgage defendant holds on the property.

DISCUSSION

As noted above, the apartment building purchased by plaintiffs was financed under section 515 of the Housing Act of 1949, 42 U.S.C. § 1485, commonly referred to as the

Rural Rental Housing Program.

Congress enacted section 515 of the Rural Rental Housing Program to alleviate the shortage of housing for elderly and low income families in rural areas. Under section 515 the United States Farm Home Administration (FmHa) is authorized to issue loans at market rates to developers and owners of property for the purpose of developing rural rental property for the elderly and low income families. See 42 U.S.C. § 1471(a).

The idea behind section 515 loans was that elderly and low income persons would have a secure home during the term of the mortgage. However, developers soon began to pay the entire outstanding balance of the loan prior to the maturity date, thus displacing the low income tenants and frustrating the purpose behind the Rural

Rental Housing Program. Lifgren v. Yeutter, 767 F. Supp. 1473, 1478 (D. Minn. 1991). Congress then enacted the Emergency Low Income Housing Preservation Act of 1987 (Preservation Act). Prior to the enactment of the Preservation Act, borrowers of section 515 loans which were approved before December 21, 1979, had the option of prepaying their mortgages at any time and removing their project for the program without restrictions. Through the Preservation Act, Congress placed certain restrictions on prepayment of section 515 loans on pre-1979 projects.

The Preservation Act operates to alter the procedure plaintiffs must follow in order to prepay their loan. Pursuant to 42 U.S.C. § 1472(c)(5)(A)(i), there is a requirement that the property be appraised at a "fair market value determined by two

independent appraisers, one of who shall be selected by the Secretary and one of whom shall be selected by the borrower." Instead of following this procedure, plaintiffs brought the instant lawsuit. Plaintiffs' main contention is that the application of the Preservation Act in this situation constitutes an unconstitutional taking.

The Court has examined the case of Lifgren v. Yeutter, 767 F. Supp. 1473 (D. Minn. 1991). The material facts and issues of the instant case are virtually indistinguishable from those in Lifgren. In Lifgren, the court held that application of the Preservation Act was not an unconstitutional taking of a borrower's property right to prepay a section 515 loan. Id. at 1486. The Court agrees with the analysis and conclusions reached by the

Minnesota district court and finds Lifgren to be a dispositive of this case.

Therefore, it is

ORDERED that plaintiffs' motion for summary disposition of the case is DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is GRANTED. Judgment shall be entered in favor of defendant and costs in the amount of $_____ shall be assessed against plaintiffs.

Dated this 17th day of December, 1992.

BY THE COURT:

\s\
RICHARD H. BATTEY
UNITED STATES
DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By: \s\ Kathleen Jeffries
Deputy Clerk
(SEAL)